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Supreme Court of the United States

OCTOBER TERM, 1933.

No. 6.

LOCAL 167 OF THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, STABLEMEN & HELPERS OF AMERICA, CARL FIRESTONE, CHARLES GERSHOWITZ, *et al.*,

Appellants,

—against—

THE UNITED STATES OF AMERICA.

BRIEF FOR APPELLANTS.

Statement.

This action was commenced in the District Court of the United States, for the Southern District of New York, on February 7, 1930,* to enjoin the defendants from engaging, in violation of §§ 1 and 2 of the Sherman Act [Act of July 2, 1890], in a conspiracy in restraint of interstate trade and commerce in live and freshly slaughtered poultry (R. 1).

This appeal is taken from the decree rendered in favor of the petitioner, after a trial before Hon. Francis G. Caffey, District Judge (R. 75-81, 84-87).

The appellants are two unions and fourteen individuals (R. 84-87). All of the individual appellants are members of one or the other of said unions. The appellant Rosen-

* An amended petition was filed April 16, 1930 (R. 1).

man is secretary of the appellant Official Orthodox Poultry Slaughterers of America, Inc. (hereinafter referred to as the "Shochtim Union"), and the appellants Weiner and Charles Herbert are delegates of the said union (R. 23). The appellants Arthur Herbert and Schomer are delegates of the appellant Local 167 of the International Brotherhood of Teamsters, Chauffeurs, Stablemen & Helpers of America (hereinafter referred to as "Local 167") (R. 23).

Jurisdiction.

The decree was filed on February 6, 1932 (R. 75).

The petition for leave to appeal to this Court was presented to the District Court on March 31, 1932 (R. 86-87), and was allowed on April 5, 1932 (R. 84-85).

The following statutory provisions sustain the jurisdiction:

The Expediting Act of February 11, 1903 (32 Stat. 823; Title 15, U. S. C. A., §29), provides as follows:

> "*Appeals to Supreme Court.*—In every suit in equity brought in any district court of the United States under any of the laws mentioned in the preceding section, wherein the United States is complainant, an appeal from the final decree of the district court will lie only to the Supreme Court, and must be taken within sixty days from the entry thereof." (Feb. 11, 1903, c. 544, Sec. 2, 32 Stat. 823; Mar. 3, 1911, c. 231, Sec. 291, 36 Stat. 1167.)

The "preceding section", referred to in the said statute, mentions §§ 1 to 7 of Title 15, U. S. C. A., and provides in part as follows:

> "*Suits against monopolies expedited.*—In any suit in equity brought in any district court of the

United States under §§ 1 to 7, inclusive, of Title 15 of this chapter or any other statutory provision having a like purpose enacted after February 11, 1903, or that may be enacted wherein the United States is complainant * * *." (Title 15, U. S. C. A., §28.)

The instant cause, as above noted, is one within §§ 1 to 7, Title 15, U. S. C. A.

The following case sustains the jurisdiction:

U. S. v. California Co-operative Canneries, 279 U. S. 553, 558.

On April 24, 1933, this Court ordered that probable jurisdiction herein was noted.

Opinions of the Courts Below.

The opinion of Judge Caffey, rendered at the close of the trial may be found in the record (R. 48-75). It is not reported elsewhere.

Opinions, upon interlocutory motions made herein, are reported in 53 F. (2d) 518; 53 F. (2d) 518; 44 F. (2d) 393.

The facts alleged in paragraphs numbered "1" to "22" of the amended petition were the basis of the first count of an indictment returned by the Grand Jury of the Southern District of New York on January 17, 1929 (R. 939). The allegations contained in the said paragraphs of the amended petition are identical with those of the first count of the said indictment, except that appellant Rosenman was not named in the said indictment (R. 939). The defendants named in the indictment were brought to trial before Hon. John C. Knox, District Judge, and a jury on October 7, 1929 (Ex. 7, p. 36). The indicted appellants, other than

the appellant Weiner, were found guilty under the first count thereof. A verdict of not guilty was directed as to the appellant Weiner (Exhibit 7, p. 2).

The record on appeal from the judgments of conviction in the criminal trial was admitted in evidence on the trial below "not as proof in this case even against" the convicted defendants, "but merely as to the Government's contention * * * to supplement the judgment roll by way of identification or elaboration of the issues that were involved in that case" (R. 754). The said record on appeal is Petitioner's Exhibit 7 herein (R. 754).

Appeals from the judgment of conviction were taken to the Circuit Court of Appeals for the Second Circuit on behalf of a number of the convicted defendants, not including the appellants herein (Ex. 7, pp. 3-5). That Court affirmed, 47 F. (2d) 156. This Court denied certiorari, 283 U. S. 837.

The following citations refer to opinions written upon various interlocutory motions made in connection with the said indictment: 30 F. (2d) 939; 34 F. (2d), 967; 33 F. (2d) 1005.

Scope of the Review.

This being an equity appeal, the facts as well as the law are open to review.

Hughes, Federal Practice, §5639;
Virginian Ry. v. *U. S.*, 272 U. S. 658, 675;
La Abra Mining Co. v. *U. S.*, 175 U. S. 423, 464.

The Amended Petition.

The material allegations of the amended petition (R. 1-22) may be summarized as follows:

1. *Description of interstate commerce in live poultry* (R. 2):

Live poultry is shipped from states other than New York and New Jersey, by persons known to the trade as "shippers", into New York and New Jersey, to persons known as "commission merchants" or "receivers", who in turn sell the poultry "as agents" for the shippers. Receivers in the State of New York sell the poultry received by them, to persons known as "marketmen", doing business in New York and New Jersey, and receivers in the State of New Jersey sell the poultry to marketmen of both New Jersey and New York.

Marketmen doing business in New York sell and ship the poultry, after slaughtering the same, in some instances directly to consumers, and in other instances to butchers and persons known as "poultry dealers", who do business in New York, and in some instances, in New Jersey. Marketmen in New Jersey sell and ship poultry to consumers, and to poultry dealers and butchers both in New Jersey and New York.

Substantially all of the poultry is sold and delivered within twenty-four hours after its arrival in the metropolitan area, passing through the channels above described without substantial delay.

2. *Description of defendants* (R. 5):

The Greater New York Live Poultry Chamber of Commerce is a voluntary association, whose membership comprises a large majority of the marketmen doing business within the City of New York. Commencing on or about May 9, 1927, and until October 1, 1928, one Benjamin Simon was supervisor of the said association.

Local 167 is a voluntary association, whose membership comprises virtually all persons engaged as employees in the handling, crating and trucking of the poultry after its arrival in New York City.

The Official Orthodox Poultry Slaughterers of America,

Inc., is a corporation. Its members are shochtim (singular: shochet), *i. e.*, persons who alone are competent under Jewish dietary laws to slaughter poultry. A majority of the consumers of poultry are persons of the Jewish orthodox faith, who require that poultry be slaughtered according to the ritual prescribed by such dietary laws.

3. *Conspiracy* (R. 10):

Beginning on May 9, 1927, the defendants engaged in a conspiracy to restrain interstate trade and commerce.

It was part of the conspiracy to allot to the marketmen-conspirators, particular butchers and poultry dealers, and to compel all butchers and poultry dealers in the City of New York to purchase poultry solely from the marketmen to whom they were allotted.

It was further part of the conspiracy to prevent butchers and poultry dealers from purchasing or selling poultry, as the case might be, at prices lower than those dictated by the conspirators, and to restrain marketmen from selling below prices agreed upon by the conspirators.

In order to carry out the objects of the conspiracy, various means were employed, including threats of violence, assaulting and beating persons, detaining and destroying vehicles engaged in carrying poultry, preventing and obstructing deliveries, instigating the refusal of Local 167 and its members to load, unload and handle poultry, refusing to deal with or sell poultry to certain persons, making levies for defraying the expenses of the conspirators, instigating the refusals of the Shochtim Union and its members to slaughter poultry, following and spying upon various persons, and employing gangsters.

4. *Threat of continuing conspiracy* (R. 16):

On August 20, 1928, an information was filed against sixty-eight defendants, being substantially the same defend-

ants named in the amended petition. The conspirators thereafter temporarily desisted from most of the acts above described, intending, however, to resume these acts as soon as they should deem it safe so to do, and never, in fact, abandoning said conspiracy.

The Chamber of Commerce, Local 167 and the Shochtim Union have been employed as essential instrumentalities of the conspiracy; they are still in existence and have not been abandoned by the conspirators, who, for the most part, still control all the important offices in said organizations and occupy strategic positions in the trade.

Within the past twenty years, the conspirators and their business predecessors have engaged in a series of similar conspiracies, which have been continuous except for temporary cessations inspired by governmental and private investigations.

Since August 20, 1928, the defendants have committed many of the overt acts above described, and which constituted an essential part of the conspiracy for which 68 defendants were convicted.

The amended petition ends with a prayer for a perpetual injunction against the defendants (R. 20).

The Answers to the Amended Petition.

1.

The answers of the appellants to the amended petition, as originally filed, in substance denied the allegations set forth therein relating to a conspiracy and monopoly in restraint of trade; denied the allegations therein set forth charging them with the commission of the overt acts alleged as the means by which the conspiracy was carried on; and denied the alleged continuance of the conspiracy or an intent to resume the same (R. 22-25).

2.

Upon motion of the petitioner, the answers of those of appellants who were convicted in the criminal prosecution above referred to, insofar as the same contained denials of the first 23 paragraphs of the amended petition, were stricken out as "sham denials made for obstructive purposes only" (R. 25-32).

The General Course of Commerce in Live Poultry.

The allegations of the amended petition as to the course of commerce were not proved *in toto*. The following statement presents the facts.

Poultry is gathered in the West by so-called "concentrators" (R. 359), who sell it to persons known as "shippers" (R. 359). The shippers sell and consign the poultry by carload freight to "receivers" or "commission men" in New York (R. 359). The latter sell it to wholesalers known as "marketmen" or "slaughterhouse men", who dispose of the poultry to "poultry dealers" or butchers, for ultimate distribution to the consumer (R. 361).

Approximately 90% of the poultry consumed in the Metropolitan area is sent in by freight (R. 361). The remainder is trucked in by local trucks or express. Of this balance, all but ten per cent. comes from without New York State (R. 361, 372).

The "freight" poultry arrives at five railway terminals: the New York Central in Manhattan; the Lackawanna at Hoboken, New Jersey; the Baltimore & Ohio at Jersey City, New Jersey; the New Jersey Central at Communipaw, New Jersey; and the Erie at Weehawken, New Jersey (R. 359). About half of the traffic is borne by the New York Central, and the balance by the New Jersey terminals (R. 361, 373).

After inspection at the terminals, the cars are unloaded

and the poultry is put into wooden coops or crates (R. 360). A part of the poultry is then loaded on the waiting trucks of marketmen, and the remainder trucked to the receivers' stands in West Washington Market in Manhattan (R. 360, 373, 379). Of the poultry arriving by freight, a total of 62½% is disposed of to marketmen in New York. The balance is loaded on the trucks of marketmen at the New Jersey terminals. Of this balance, "the majority" is trucked into New York by the marketmen, and the remainder distributed to points in New Jersey (R. 365, 373, 379).

The trucking to Washington Market is done by the New York Live Poultry Trucking Co., which is employed by the railways for that purpose. The poultry, being all consigned to New York (R. 370, 373), including that portion which arrives at the New Jersey terminals, the railways undertake to deliver it to West Washington Market (R. 364, 365). Freight, cartage and ferriage, are all paid by the shipper (R. 364, 365, 375, 376).

Shipment is generally made under a straight bill of lading; the shipper attaches a draft drawn for the approximate selling price of the poultry, as thereafter fixed, which draft upon presentation is usually paid by the receiver before he gets the poultry (R. 363, 366).

The price of the poultry is undetermined when it is shipped. The price becomes fixed on the day of unloading (R. 362, 366, 367). The price is the market price on that day (R. 362, 366, 367). The receiver pays the price as thus determined, less freight, cartage, ferriage, coopage, and a commission of from three to five per cent (R. 363). About twenty per cent. of the poultry, however, is so-called "purchase poultry". It differs from the "commission poultry" in that the price is determined prior to shipment, instead of on the date of unloading (R. 368).

Although the receivers receive a "commission", they are in fact purchasers of the poultry (R. 367). Title to the poultry, for all practical purposes, passes to them immedi-

ately upon the unloading (R. 369). From that time they have full dominion; they bear all losses and derive all gains in the value of the product (R. 363, 364, 367). The shipper, once the poultry is unloaded on his order, loses all control over it (R. 366). From that time, the receiver may do as he pleases with the poultry; he is responsible to the shipper only for the price (R. 368). The receiver chooses the purchasers, extends credit at his own risk, fixes his selling price (R. 365, 367). In short, the unloading is the "line of demarcation" (R. 377).

The shippers have no contact with the marketman (R. 366); the shippers deal solely with the twenty receivers in New York (R. 369). They consign and bill their poultry to "simply New York" (R. 362, 370, 373).

The New York Live Poultry Trucking Co. employs members of Local 560 of the International Brotherhood of Trucksters, Teamsters, etc., with offices in Jersey City. Members of Local 167 are employed by receivers only in New York, at Washington Market, to unload the incoming poultry and to load for marketmen (R. 360). No members of the Shochtim Union are employed by the receivers; they work for marketmen, who sell only slaughtered poultry (R. 361-364).

Statement of the Facts.

(1) The Greater New York Live Poultry Chamber of Commerce was organized during the year 1926 (R. 634). Its members were marketmen doing business in New York. Maintenance was sustained by a system of assessments upon members of 10c. upon each coop of poultry sold by each. The coops being rented to the marketmen, they were entitled to a refund of 35c. on each coop returned to the owners in good condition. By agreement of the parties, the owners refunded only 25c. to the marketmen and paid the remaining 10c. directly to the Chamber of Commerce in behalf of the particular marketmen (R. 157, 158).

During 1926, and for a while in 1927, one Major L'Esperance, was its "supervisor" (R. 163). During his incumbency as supervisor, there was frequently discussed with Major L'Esperance, the matter of the formation of a credit information bureau (R. 163). Credit was for long a deepseated evil of the industry (R. 337). Nothing was done about the matter, however, and Major L'Esperance resigned in April of 1927 (R. 163, 164, 634, 638).

The members of the Chamber of Commerce, feeling that a supervisor was necessary, called upon Albert Ottinger, then Attorney General of New York (R. 152). He recommended to them one Benjamin Simon, a deputy attorney general, as being a person well acquainted with the industry (R. 153). After a conference with Simon, he was engaged by the Board of Directors of the Chamber of Commerce at a salary of $300 per week (R. 153).

(2) Shortly thereafter it was proposed at a meeting of the directors, that a fund be raised for the purposes (a) of establishing a credit-information bureau, (b) of fighting the unions, and (c) of building a central terminal so that all poultry would arrive in New York (R. 153, 635). The

money was to be raised by a tax of one cent per pound on every pound of poultry sold by the members of the Chamber of Commerce (R. 153, 635).

The city was divided into districts (R. 153, 635). In charge of each district was a director of the Chamber of Commerce (R. 153, 635). Meetings were held in each district, at which the proposal was explained to the marketmen (R. 139, 251, 386, 637).

Between the time of the first meeting of directors and the various district meetings, other features appear to have been added to the plan, however. At the sectional meetings there was discussed in addition to the original plan (R. 149, 150, 153, 206, 335, 351, 386, 388, 393, 543, 544), the allotment of particular retailers to particular marketmen and the elimination of wholesale dealing by the smaller dealers (R. 140, 141, 142, 251, 253, 295-297, 386, 393, 538, 633, 636). Some testimony appears in the record, to the effect that uniform prices dictated by a central office, were to be charged (R. 179); but it stands uncorroborated, and, in fact, contradicted (R. 206, 251, 396).

Credit losses seem to have been the underlying reason for the plan of allocation of customers.* It was thought that "it was necessary, in order to keep track of a butcher's credit, that he deal at one certain place" (R. 244).

---

* The method by which the marketmen were defrauded was graphically explained by one witness as follows (R. 149-150): "These butchers were supposed to settle their bills with the marketmen about once a week. Very frequently these butchers would fail to settle with their marketmen and go to another marketman. And that created great loss in the business for the marketmen, as high as $1,500 to $2,000 to a customer. I will tell you about the butchers: One butcher came into me this week and kill by me $500 poultry a week. The following week he is supposed to come and bring me a check for this $500. If he don't bring me the check I wouldn't give him any more poultry; but the following week he did not come into me, and did not bring the check. He went away to second market and killed $500 poultry over there. His second marketman didn't know he owes me the money, and the third week the butcher went to a third market and took $500 poultry, and finally, when he owed $1,500, the marketmen had no money and no customers."

It was thought, too, that the plan would avoid ruinous "overstocking" (R. 544).*

Underlying the plan of eliminating by purchase wholesale dealing by smaller dealers, was eradication of wasteful business methods and ruinous price cutting (R. 140, 141). The smaller dealers could not handle their wholesale trade profitably; the larger dealers were equipped to deal with it profitably (R. 545, 636). Furthermore, a small dealer who could not afford to employ a union man, came into conflict with union regulations requiring all who did wholesale business, no matter how little, to engage at least one union man (R. 494).

(3) In the course of the sectional meetings, various retailers were allocated to particular marketmen (R. 295, 300); a number of smaller marketmen were promised weekly sums to induce them to turn over their wholesale business to the bigger dealers (R. 142). "Collectors" were appointed for the various districts, to collect the moneys assessed against the marketmen (R. 152, 153).

(4) However well adapted these plans were for eradicating the evils of the industry, they were never more than partially carried out.

Retailers refused to purchase from the marketmen to whom they were allocated (R. 214, 235); marketmen sold

* Describing "overstocking", the witness Danziger stated (R. 544): "I recall the term 'overstocking' being used, carrying too much stock. That was talked about at those meetings. The marketmen would buy stock sufficient for their regular trade and in addition buy extra stock. I guess we all do it. That is what is known as run around trade. Run around trade is mostly bad money. People that really could not get credit in one place would run around all over for goods, and when we had stock left over, we would sell it to them. We would sometimes sell them the stock we ought to use for our regular customers. That very often turned out to be a bad debt. At this meeting it was mentioned that the people should not carry this extra stock because of its hurting the trade and resulting in bad debts. That is an old disease. It sometimes happened that we would carry stock for this run around trade and then they would not come in and buy it and we would have it on our hands; and when we had to carry poultry like that, we had to take a loss on it. It would shrink and lose weight. Some of it would die. When it dies a natural death we cannot sell it, we have to throw it away. That was one of the evils that we were discussing in these meetings of this organization."

to butchers allotted to fellow marketmen (R. 241, 291, 301). Disputes arose between marketmen and collectors representing the Chamber of Commerce, as to payment of the weekly assessments (R. 142, 291, 335).

(5) In an effort to force collections, and to enforce the scheme of allocation, the marketmen resorted to violence and other alleged unlawful means.

Retailers who did not observe the scheme of allotment were spied upon, assaulted, threatened with violence, and prevented from buying at places other than those to which they were assigned (R. 214, 215). In like fashion, non-complying marketmen were assaulted and threatened with violence (R. 326).

It is difficult to ascertain from the record the exact part played by the Shochtim Union and Local 167 in the situation. Undoubtedly, the unions, cooperating with each other, did attempt to bring non-conforming marketmen into line with the decrees of the Chamber of Commerce. In a few isolated instances, the unsuccessful efforts of non-conforming marketmen to obtain poultry can be attributed to the unions. Upon the pretext that particular non-conforming marketmen were not complying with union regulations, strikes were called, and there were refusals to load or to slaughter (R. 328, 335). In nearly all instances, however, the actions of the unions were the result of legitimate disputes with marketmen over the working hours, wages and employment of union men (R. 243, 244, 245-248, 255, 292, 295, 327, 328, 352, 387, 409, 531, 547, 548, 550, 579, 580).

(6) The attempts of the marketmen to enforce collection of the assessments, and to compel conformance to the system of allocation, ceased prior to the Fall of 1928. The cessation was voluntary; the result of a realization of the futility of the plan (R. 147). Witness after witness testified to the fact of complete normalcy in the business after August, 1928 (R. 138, 139, 149, 151, 169, 229, 233, 234, 240, 241,

245, 271, 276, 278, 295, 328, 339, 346, 357, 381, 383, 385, 388, 396, 447, 463, 499, 506, 580, 633, 645).

There were many disputes between the unions and particular marketmen, subsequent to August, 1928. But each, in so far as the unions were concerned, was a bona fide labor controversy totally unconnected with any general scheme or plan whatsoever (R. 246-248, 409, 419, 434, 438, 441-444, 472, 482-484, 486, 628-631, 646-651).

(7) By evidence concerning these disputes, by evidence regarding the organization of various associations of marketmen and retailers after the Summer of 1928, by testimony concerning a local controversy between marketmen and commission merchants in Newark, New Jersey, and by testimony regarding a rise in the price of poultry in parts of New York in September, 1931, the petitioner sought to sustain its contention that the conspiracy for which a number of the defendants were convicted in 1929, was in existence at the time of the filing of the petition. The contrary being a basic contention of the appellants, it is our purpose to develop the evidence concerning each of these matters in detail hereunder, and to demonstrate not merely that there was a cessation of the practices for which the defendants were convicted, but that there is no dangerous probability of a resumption thereof.

The Statutes Involved.

Petitioner bases its right to a decree upon §§1, 2 and 4 of the Act of July 2, 1890 (26 Stat. 209), which read as follows:

> "§1. *Trusts, etc., in restraint of trade illegal; penalty.* Every contract, combination, in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every

person who shall make any such contract or engage in any such combination or conspiracy, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding $5,000, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court. (July 2, 1890, c. 647, §1, 26 Stat. 209.)"

"§2. *Monopolizing trade a misdemeanor; penalty.* Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several states, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding $5,000, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court. (July 2, 1890, c. 647, §2, 26 Stat. 209.)"

"§4. *Jurisdiction of courts; duty of district attorneys; procedure.* The several district courts of the United States are invested with jurisdiction to prevent and restrain violations of Sections 1 to 7, inclusive, or Section 15 of this chapter; and it shall be the duty of the several district attorneys of the United States, in their respective districts, under the direction of the Attorney General, to institute proceedings in equity to prevent and restrain such violations. Such proceedings may be by way of petition setting forth the case and praying that such violation shall be enjoined or otherwise prohibited. When the parties complained of shall have been duly notified of such petition the court shall proceed, as soon as may be, to the hearing and determination of the case; and pending such petition and before final decree, the court may at any time make such temporary restraining order or prohibition as shall be deemed just in the premises. (July 2, 1890, c. 647, §4, 26 Stat. 209; Mar. 3, 1911, c. 231, §291, 36 Stat. 1167.)"

Summary of Arguments; Specification of Assignments of Error.

I.

THERE IS NO PROOF THAT DEFENDANTS INTENDED TO RESTRAIN, OR IN FACT INTERFERED WITH INTERSTATE COMMERCE. THE EVIDENCE AT MOST SHOWED A LOCAL CONSPIRACY IN RESTRAINT OF INTRASTATE COMMERCE, OVER WHICH THE FEDERAL COURTS HAVE NO JURISDICTION (ASSIGNMENTS OF ERROR I, V, VIII, XII, XIII).

II.

ASSUMING THAT THE DEFENDANTS WERE GUILTY OF A CONSPIRACY IN RESTRAINT OF INTERSTATE COMMERCE, THE PROOF SHOWS THAT THE SAME WAS VOLUNTARILY ABANDONED LONG PRIOR TO THE FILING OF THE PETITION HEREIN. NOR IS THERE A DANGEROUS PROBABILITY OF A RESUMPTION THEREOF (ASSIGNMENTS OF ERROR IV, V, VIII, XII, XV).

III.

IN ANY EVENT, THE PETITIONER DID NOT SUSTAIN ITS BURDEN AS AGAINST THE DEFENDANTS WEINER, ROSENMAN AND MARKMAN. THERE WAS NO CREDIBLE EVIDENCE CONNECTING THEM WITH THE ALLEGED CONSPIRACY. THE DECREE SHOULD BE REVERSED AS AGAINST THESE DEFENDANTS (ASSIGNMENTS OF ERROR IV, V, VIII).

IV.

THE COURT BELOW COMMITTED REVERSIBLE ERROR IN STRIKING OUT AS SHAM, PORTIONS OF THE ANSWERS OF THE DEFENDANTS CONVICTED IN THE CRIMINAL PROSECUTION (ASSIGNMENTS OF ERROR IX).

V.

IN ANY EVENT, THE DECREE SHOULD BE MODIFIED BY ELIMINATING PARAGRAPH "8 (1)" THEREFROM, AND BY LIMITING THE SWEEP OF THE INJUNCTION TO CONDUCT TENDING TO THE RESTRAINT OF INTERSTATE COMMERCE (ASSIGNMENTS OF ERROR IV, V, VIII).

FIRST POINT.

There is no proof that defendants intended to restrain, or actually interfered with interstate commerce. The evidence, at most, showed a local conspiracy in restraint of intrastate commerce, over which the federal courts have no jurisdiction.

A.

As the basis for the injunction, petitioner sought to prove (1) that the defendants conspired to, and in fact, restrained interstate commerce by interfering with the usual course of trade, as alleged in the petition; and (2) that they conspired to, and actually interfered with particular transactions in interstate commerce, which were not in the usual course of trade.

B.

*There Was No Interference With the Usual Course of Interstate Trade and Commerce.**

The operation of the Sherman Act, by its express terms, is limited to restraints upon interstate commerce (§§ 1, 2). "The statute has no application to a restraint of intrastate commerce, nor to a conspiracy in relation thereto" (Thornton's, Combinations in Restraint of trade, 359). Over restraints of purely intrastate trade, the Federal courts have no jurisdiction.

Hopkins v. *U. S.*, 171 U. S. 578;
Anderson v. *U. S.*, 171 U. S. 604;
Addyston Pipe & Steel Co. v. *U. S.*, 175 U. S. 211;
U. S. v. *E. C. Knight Co.*, 156 U. S. 1.

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*Alleged interference with that portion of the traffic which arrives at the New Jersey terminals and is borne by particular marketmen to their slaughterhouses in New York, is dealt with under "F", *post*.

C.

There is no claim that the defendants interfered with trade between shippers and receivers. Their alleged unlawful activities were restricted to transactions between receivers and marketmen, on the one hand, and marketmen and retailers on the other hand (R. 10-20). The jurisdiction of the court to enjoin defendants, insofar as it is based upon their alleged interference with the usual course of trade, consequently rests upon a determination that poultry remains in interstate commerce until the sale by the receiver to the marketman.

It is appellants' contention, on the contrary, that interstate commerce ceases with the receipt of the poultry in New York by the receiver; that the subsequent transactions from receiver down to consumer, constitute no part of interstate commerce; that in consequence, appellants' alleged interference was beyond the purview of the Sherman Act, and without the jurisdiction of the District Court.

D.

The line of demarcation between interstate commerce and intrastate commerce is often difficult to determine. There are, however, some well established principles which are of aid in making a determination. The application of these principles to the evidence herein, leads to the conclusion that interstate commerce in poultry ceases with delivery to the receiver in the usual course.

1. Interstate transportation, having commenced, continues until the arrival of the goods at the *intended* destination. It ceases with delivery to the consignee in the usual course of business. Sales thereafter are intrastate matters.

Industrial Assn. v. *U. S.*, 268 U. S. 64;

Adams Express Co. v. *Kentucky*, 214 U. S. 218;
Rhodes v. *Iowa*, 170 U. S. 412;
Atlantic Coast Line v. *Standard Oil Co.*, 275 U. S. 257;
Wagner v. *Covington*, 251 U. S. 95;
Robins v. *Shelby Co. Tax District*, 120 U. S. 489;
Gavit, The Commerce Clause (1932) p. 112.

That the *intended* destination is the receiver's stand in West Washington Market is clear:

(a) The product is *consigned* to the receiver (R. 359, 374).

(b) The goods are shipped under a straight bill of lading (R. 362, 374), with *draft* attached, *drawn* on the receiver (R. 362).

(c) *Freight* is paid by the shipper to the receiver's place of business (R. 363, 364, 365, 370, 375, 376); cartage to the marketman's place of business is borne by the marketman (R. 379).

(d) The shipper has *contact* with the receiver exclusively; he has no dealings with the marketman (R. 365); sales to the marketman are made by the receiver alone (R. 365, 367, 376).

(e) The shipments to the receiver are *actual sales* (R. 367). After unloading, all gains and losses are borne by the receiver (R. 363, 367, 368, 369, 375, 376); "* * * the unloading becomes the line of demarcation" (R. 377). After unloading the shipper maintains no *control* over the poultry whatsoever (R. 365, 367); complete *dominion* is vested in the receiver; he is responsible to the shipper for nothing but the price (R. 368).

(f) *Sales* by the receiver to the marketman are in all cases made *after* the arrival of the poultry, and not before (R. 364, 372, 379-380).

(g) If poultry can be said to come to *rest* in the State at all, it does so when it reaches the hands of the receiver. Owing to its perishable nature, it is not warehoused upon its arrival; receivers, marketmen and retail dealers pass it along as rapidly as possible to the consumer. At the receiver's stand in West Washington Market, it is *intermingled* with other goods, so as to become indistinguishable from these other goods, and is thus sold (R. 366). Not only is the poultry received from without the State confused with other goods, but it is often carried by the receivers for periods up to two weeks (R. 366, 370). Receivers regularly carry over 100 to 150 coops every night (R. 370).

2. It is often said that the determination of the question when interstate commerce ceases and intrastate commerce begins is a practical matter. It is a question of fact to be "tested by the actual transaction" (*W. U. T. Co.* v. *Speight*, 254 U. S. 17, 18). It is a "practical conception" (*Rearick* v. *Penn.* 203 U. S. 507, 512).

See, too:

Swift & Co. v. *U. S.*, 196 U. S. 375, 398.

The proof is clear that, as a practical matter, interstate commerce in poultry ceases with its receipt by the receiver.

The outline summary set forth above makes it apparent. A complete reading of the testimony of petitioner's witnesses, Frankel and Hawk (R. 359-380), the only witnesses who testified on this subject, only elaborates the essential facts above set forth; their testimony leads necessarily to

the conclusion that the traffic in poultry loses its interstate character after delivery to the receiver, as a practical matter. What happens to the poultry after receipt by the receiver, is "the result of new and independent arrangements" (*Industrial Ass'n. v. U. S.*, 268 U. S. 64, 71).

E.

The petitioner tried this case, and drafted the amended petition, upon the theory that the shipment of poultry from the farmer in the West to the ultimate consumer in New York City, is *one continuous act of interstate commerce.* The petition itself contains a paragraph entitled "Continuity of Interstate Commerce", reciting that the poultry passes "from the shipper to the receiver, marketmen, poultry dealers and butchers to the ultimate consumers continuously and without substantial delay" (R. 4).

Continuity of movement cannot, as contended by petitioner, be made determinative here.

There is no basis for differentiating sales by receiver to marketman, from marketman to retailer, or retailer to consumer. All are made within the State; all are made within a short period after the arrival of the poultry. In consequence, logical application of petitioner's theory necessarily leads to the conclusion not merely that the sale by the receiver to the marketman is part of interstate commerce, but that the transactions between marketman and retailer, and retailer and consumer also constitute trade and commerce among the several States!

The absurdity of such a determination is well illustrated by a statement of this Court in *New York ex rel. Penn. Ry. Co. v. Knight,* 192 U. S. 21, where it was said, at page 28:

> "If a cab which carries passengers from the hotel to the ferry landing is engaged in interstate transportation, why is not the porter who carries the

> traveler's trunk from his room to the carriage also engaged? If the cab service is interstate transportation, are the drivers of the cabs and the dealers who supply hay and grain for the horses, also engaged in interstate commerce, and where will the limit be placed? We are of the opinion that the cab service is an independent local service preliminary or subsequent to any interstate transportation."

Where should the line of demarcation be drawn? The sale by the receiver to the marketman? By the marketman to the retailer? Or the retailer to the consumer? The petitioner chooses to draw the line at the time of the purchase by the marketman, upon the theory that the shipment from the shipper to the receiver to the marketman, is a continuous, unwavering, movement. But does not the same reasoning apply to the marketman himself, and to the retailer? Each performs the same function as the receiver, viz: to hold the poultry only long enough to pass it on to the ultimate consumer.

As a practical matter, the "ultimate destination" of the poultry is the consumer; but petitioner is reluctant to follow its theory to its logical conclusion, and stops midway, at the sale to the marketman. We submit that there is certainly no logical or practical reason for calling a halt at this point.

The practical consequences arising from the interpretation contended for by the petitioner are manifest. The course of interstate commerce is unduly extended and gives federal control over transactions which, in their nature, are essentially local. Logical application of petitioner's theory would place retail grocerymen and distributors under federal control, to the exclusion of the States. Sales of such commodities as poultry, groceries and vegetables are essentially local in their nature, and the manner of

distribution of such articles solely within the State where consumption is effective, should not be under federal supervision.

* * * * * * * * * * *

The decision of the Circuit Court of Appeals (47 F. (2d) 156), on the appeal in the criminal action against the defendants herein, is based primarily upon three authorities:

> *Swift & Co.* v. *U. S.*, 196 U. S. 375;
> *Stafford* v. *Wallace*, 258 U. S. 495;
> *People's Gas Co.* v. *Public Service Commission*, 270 U. S. 550.

In the *Swift* and *Stafford* cases, it was held that the stockyards to which the livestock was consigned and delivered, was not a final destination, but a "throat through which the current flows", and the sale there made was only "an incident which does not stop the flow but merely charges the private interest in the subject of the current without interfering with its continuity". The determinative factors in those cases appear in the statement from the *Stafford* case, at page 516:

> "The origin of the live stock is in the West; its ultimate destination, known to, and intended, by all engaged in the business, is in the Middle West and East either as meat products or stock for feeding and fattening. This is the definite and well-understood course of business. *The stockyards and the sales are necessary factors in the middle of this current of commerce.*" (Italics ours.)

The *Swift* case and the *Stafford* case are thus clearly distinguishable from the case at bar. The transaction by the dealers in Chicago was one *in the middle of the flow of interstate commerce.* In the regular and accepted course

of business, all parties involved intended that the cattle would resume its journey to other states as soon as it passed through the hands of the packers.

In the case at bar, on the other hand, when the poultry reached the receiver in New York, it reached its final resting place so far as interstate traffic, as a fact, was concerned; it was never again precipitated into the flow of trade among the states. It was, in the usual course of events, used *exclusively* for domestic consumption within the State of New York. It was not intended for or shipped without the State; it reached the point of ultimate destination when it was delivered to the receiver.

The fact, as pointed out by the Circuit Court of Appeals, that Mr. Justice Sutherland, in distinguishing these cases in his opinion in *Industrial Association* v. *U. S.* (268 U. S. 64) failed to mention these features, is of little significance. It is hardly sufficient to counteract the express language of those cases.

People's Natural Gas Co. v. *Public Service Commission*, 270 U. S. 550, is also clearly distinguishable from the instant situation. The product there involved, was shipped from without the state directly to the consumer. Its destination was the consumer, and interstate transportation necessarily continued until that point was reached. If, in the instant situation, the poultry was consigned and delivered by the shipper, not to the receiver, as is the case, but to the marketman, the case would be applicable.

Public Utilities Commission v. *Landon*, 249 U. S. 236, and *State of Mo.* v. *Kansas Gas Co.*, 265 U. S. 298 (both gas cases), emphasize this distinction. The situations presented by these cases are more analogous to the case at bar. In the *Kansas Gas Co.* case, it was said, at page 308:

"The business of supplying on demand, local con-

sumers, is a local business, even though the gas be brought from another state and drawn for distribution directly from interstate mains; and this is so whether the local distribution be made by the transporting company or by independent distributing companies. In such case, the local interest is paramount, and the interference with interstate commerce, if any, indirect and of minor importance."

Industrial Association v. *U. S.* (268 U. S. 64), was distinguished from the instant case, by the Circuit Court of Appeals upon the ground that the plaster (the product there involved), after being imported from without the State, was brought to rest in salesrooms and warehouses and commingled with local goods, whereas the poultry herein was not warehoused or commingled with local goods.

The evidence is, however, that while poultry was not warehoused it was often kept by receivers for as long as two weeks before being disposed of (R. 364). True it is that the goods, in the usual course, were disposed of in one day. But this was necessitated by the perishable nature of the poultry.

The query naturally suggests itself: Of what importance is the warehousing of the poultry, and of what importance is the perishable nature of the goods in determining what constitutes interstate commerce? Are we to have one rule applicable to live poultry and another to smoked ham—one rule with reference to fresh strawberries and another to canned peas?

In so far as commingling is concerned, it was expressly testified that the poultry of one shipper is intermingled with the poultry of other shippers (R. 366). Whether the poultry thus confused includes purely domestic poultry, does not appear from the testimony. It seems reasonable to infer, however, that foreign poultry is often confused with the domestic product on the stands of the receivers.

A reasonable inference also is that the incoming product is confused with poultry long at rest on the receivers' stands.

It is submitted, furthermore, that the Circuit Court of Appeals, in attempting to distinguish the *Industrial* case, has limited the holding of that case considerably. The decision therein has been interpreted more broadly to mean that dealings within the state of consumption, between local wholesalers and retailers, are properly local in character.

> *U. S.* v. *Southern California Wholesale Grocers Ass'n.* (D. C. S. D. Calif. 1925), 7 F. (2d) 944;
> 44 Harvard Law Review 868.

The case of *U. S.* v. *Live Poultry Dealers' Protective Ass'n.*, 4 F. (2d) 840, is fundamentally different from this case, in that the receivers there acted as agents of the shippers. For the same reason, *Binderup* v. *Pathe Exchange*, 263 U. S. 291, is inapplicable.

The recent case of *Federal Trade Commission* v. *Pacific State Paper Trade Association*, 273 U. S. 52, is in no way opposed to appellants' contentions. The sales in that case were made *prior* to the placing of the product in interstate commerce; in addition, the goods were in many instances shipped directly to the consumer. Here, on the other hand, the sale to the marketman is always *subsequent* to receipt by the shipper; the shipper never sells to the marketman (R. 364, 372, 379-380). The distinction is well recognized (Gavit, The Commerce Clause, §68).

F.

There Was No Restraint Upon Particular Transactions in Interstate Commerce, Without the Usual Course.

Testimony regarding alleged interferences with interstate purchases and sales, outside the regular course of

trade, was given by the witnesses Davis (R. 131), Steinberg (R. 178, 829), Harnett (R. 295), Edelstein (R. 324), Birnbaum (R. 350), Feld (R. 380), Hecht (R. 399), Goldman (R. 507), Bernklau (R. 552), Sandler (R. 563), Mornick (R. 569), and Finkelstein (R. 463).

Sam Davis, a New Jersey marketman, testified that he experienced difficulty in obtaining poultry at the New Jersey terminals and in West Washington Market, during several months of 1927 (R. 133). The reason was that the union men refused to load for him (R. 133). He was told to get a union book from the New Jersey local (R. 133, 137). When he obtained one, he was loaded (R. 138). He testified further that he was told by one John Conlin, delegate of the New Jersey union, not to sell to certain Coney Island, New York, butchers, and was warned that his health department permit would be taken away if he did not desist (R. 134). The request apparently was made in conjunction with a demand that the witness cease selling wholesale, since he employed no union men (R. 134). But whatever the reason, it affirmatively appears from the record that there was in fact no interference with Davis' sales to the Coney Island butchers (R. 552, 553).

Sam Bernklau, a Coney Island butcher, respecting his purchases without the State, testified merely that he dealt with Sam Davis of Jersey City from about November, 1927 to March, 1928; that he then ceased dealing with Davis, and began to purchase from Coney Island marketmen again; that "Sam Davis sold me as much as I wanted, he never refused and never told me he could not sell me" (R. 552, 553).

The extent of the alleged interferences with *Bennie Sandler*, a Coney Island butcher (R. 563), was merely this: that several times in 1927 and early 1928 he was followed when he went to New Jersey to buy poultry (R. 564-568). His purchases in New Jersey, however, were in no way restrained (R. 564-568).

Max Feld, a New York butcher (R. 380), testified that in September, 1927, he attempted to buy poultry in Englewood, New Jersey; that he was told that he could not get poultry there (R. 380, 381). The name of the market in Englewood, he did not know; nor did he identify the person who allegedly refused to sell to him (R. 380, 381).

Peter Birnbaum, a marketman, testified to alleged difficulty in obtaining poultry at the Lackawanna Railway, in New Jersey, for three or four days in 1927 (R. 350-352). His trouble was due solely to a dispute with the union (R. 351, 352, 353); his inability to get poultry was caused by refusal of the union men to load for him (R. 352). According to the Court below, the union's action in this regard was proper (R. 69).

Petitioner sought to infer from the testimony of *Harry Goldman*, that defendants were exercising a restraint upon trade between New Jersey marketmen and New York receivers. Goldman, a New Jersey marketman, stated that he went to buy poultry in West Washington Market in the spring of 1931; that while there he was asked by a person, one "Max", whether he sold poultry to a "Nochemson", and that if he did he would not be able to get "stuff" himself (R. 518, 519). Who "Max" was, or his relation to the defendants, the witness could not say; he had never heard the name of defendant Max Keslin (R. 519, 520).

Mack Harnett, a Brownsville marketman (R. 295), testified that he bought poultry without interference, in Baltimore, West Virginia, and Bridgeport (R. 308); that he bought in Philadelphia and on one trip back, noticed that he was being "trailed" by some of the defendants (R. 308); that he was unable to obtain poultry at the railway terminals in New Jersey in 1927 (R. 303). In view of the fact that he was engaged in a labor controversy at the time (R. 301, 305), it is difficult to determine whether this was due to an outright refusal to sell, alleged recalcitrance, or whether it was due to a refusal to load.

The witness *Barney Hecht* (R. 399, *et seq.*) testified to a number of alleged interferences with purchases in New Jersey; his testimony respecting alleged refusals to sell was not only contradicted by every person allegedly involved (R. 716, 742, 743, 744, 747, 748), but was disposed of by the trial court with the comment that "no considerable probative effect" could be given thereto (R. 68); and "* * * it is difficult to tell just what he did testify" (R. 436).

Samuel Edelstein, a Brooklyn marketman (R. 325) testified to being unable to get poultry at the Erie Terminal in New Jersey once in September, 1927 (R. 325, 327); the union men refused to load for him because of a dispute he was then engaged in with the union (R. 327, 328).

Aaron Steinberg, a Bronx marketman, testified to an inability to purchase poultry in Philadelphia in 1930 (R. 189). The cause was his failure to make the necessary deposit for the shipment (R. 870, 871). A shipment of crates to his market from New Jersey was recalled, not because of coercion exercised by defendants, but merely because of a feeling of sympathy on the part of the shipper with the unions (R. 844, 848, 849), who were then engaged in a dispute with the witness (R. 874, 876, 881, 883, 884).

The foregoing includes every instance, but two, of alleged interference with interstate trade, without the usual channels. Upon the basis of this testimony, as thus analyzed, and after giving full credence to the testimony of the witnesses Finkelstein and Mornick (R. 465, 570, 571), in the light of the fact that over two hundred car loads of poultry are sold and shipped into the New York market each week (R. 373), representing a value of about $50,000,000 per annum, it is submitted that the slight restraint exercised during the period of almost five years covered by the evidence, should be subjected to the rule *de minimis non curat lex* (*Industrial Ass'n v. U. S.*, 268 U. S. 64, 84).

SECOND POINT.

Assuming that the defendants were guilty of a conspiracy in restraint of interstate commerce, the proof shows that the same was voluntarily abandoned long prior to the filing of the petition herein. Nor is there a dangerous probability of a resumption thereof.

A.

In the absence of a "dangerous probability" of resumption, injunctive relief will not be granted where the evidence indicates the voluntary abandonment of a conspiracy or monopoly in restraint of interstate commerce, uninspired by fear of prosecution.

U. S. v. *U. S. Steel Corp.*, 251 U. S. 417, 446;
Industrial Assn. v. *U. S.*, 268 U. S. 64, 84;
Swift & Co. v. *U. S.*, 196 U. S. 375, 396;
U. S. v. *American Can Co.*, 230 Fed. 859;
U. S. v. *E. I. DuPont deNemours & Co.*, 188 Fed. 129.

Nor does the mere existence of the power to restrain or monopolize interstate commerce come within the purview of the Sherman Act. (*Cf. U. S.* v. *U. S. Steel Corp.*, 251 U. S. 417.)

B.

Cessation of Essential Elements of Alleged Conspiracy.

Voluntary abandonment of the alleged conspiracy can best be demonstrated by proof of the cessation of all of its alleged essential activities.

1. A vital element, according to petitioner, was the collection of weekly assessments (R. 15). Collections ceased in the Summer of 1928 (R. 149, 151, 197, 271).

2. An alleged outstanding element was the payment of weekly sums to particular marketmen in return for their wholesale trade (R. 16). These payments ceased, of necessity, when collections stopped (R. 151, 253, 271, 351, 545).

3. Another alleged element was the holding of sectional meetings to effectuate the allocation of customers and to fix prices. Sectional meetings were not held after August, 1928 (R. 149, 151, 169, 271, 328). Price fixing and allocation of retailers were also absent.

4. Threats and violence were allegedly employed to enforce the scheme of allotment. The proof is clear that subsequent to August, 1928, there were no interferences with purchases and sales (R. 138, 139, 141, 151, 169, 229, 233, 234 240, 241, 245, 271, 276, 278, 295, 328, 339, 346, 357, 381, 383, 385, 388, 396, 447, 463, 499, 506, 580, 633, 645).

C.

Incidents Subsequent to August, 1928.

It is true that subsequent to August, 1928, there were a number of controversies between the unions and various marketmen. In each instance, however, the cause of the difficulty was a *bona fide* labor dispute. Allocation of customers and price-fixing were in no way involved. The unions resorted to lawful means in each case to enforce their contentions. They did not order commission merchants not to sell to recalcitrant marketmen; they merely instructed their members not to handle poultry intended for such marketmen, a proper method of compelling compliance with union regulations (R. 69).

The chief complainant against the unions for their alleged interferences with purchases subsequent to August, 1928, was *Aaron Steinberg*, a Bronx marketman (R. 178, 829*).

All of the difficulties of the witness Steinberg occurred between February or March, 1930, and May or June of the same year (R. 185). They were admittedly solely due to a labor dispute (R. 838, 884, 885). The witness, determined to "beat" the unions, discharged all of his union help and attempted to run a non-union market (R. 838, 876, 879, 881). Thereafter, he was unable to get poultry at West Washington Market. He testified that the commission men refused to sell him, for fear of themselves being involved in disputes with the unions. Upon the hearings before Judge Knox, the commission men to whom these statements were attributed by Steinberg, were called as witnesses (R. 861, 863, 864, 866, 867, 872). Each emphatically denied that he refused to sell because of fear of the unions (R. 861, 862, 863-868, 873). The witness Steinberg's inability to get poultry at West Washington Market was attributed by them to various causes, viz.: his credit was bad (R. 864, 865, 867, 868); he attempted to buy after particular commission men were all sold out (R. 862, 864, 867); in some instances he did not even approach a house with a request to sell (R. 861, 866): the members of Local 167 would not load for him (R. 862, 873).

His inability to get poultry in Philadelphia was explained by the fact that he failed to make the necessary deposit for the shipment (R. 870, 871). The unions were in no way involved (R. 871).

His testimony concerning the shipment of poultry from Lincoln, Nebraska, through Roscoe Wood, was contradicted

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* Defendants' Exhibit A is the record of a hearing before Judge Knox, upon the complaint of the witness Steinberg, for an alleged violation of probation by the defendants convicted in the criminal case (R. 829 *et seq.*).

in every respect by a number of witnesses (R. 839-842, 846, 847, 890, 892).

His inability to get crates can be attributed only to a feeling of sympathy with the union cause on the part of the makers. They were in no way threatened by the unions (R. 844, 848, 849).

Of significance, is the fact that Judge Knox, upon the close of the hearing (of which Steinberg's testimony upon the trial herein, was merely a summary), refused to take any action against the defendants (R. 896). Of even greater significance, as obviously appears from the evidence, Steinberg's difficulties were totally unconnected with any conspiracy or combination attempting to fix prices or allocate customers. His difficulties arose from a *bona fide* labor dispute between himself, individually, and the unions.

Barney Hecht, a Brooklyn marketman, was another complainant against the unions (R. 399). Described by Judge Caffey as "scatterbrained" (R. 68), his testimony is so confused as to defy analysis (R. 436). His alleged misfortunes subsequent to August, 1928, were undoubtedly due to the sole fact that he refused to unionize his market (R. 409, 438). His inability to get poultry in West Washington Market during this period was due to one fact: the refusal of union men to load for him; concededly, no commission man refused to sell him, or expressed fear of union trouble if they did sell (R. 418, 419, 427). His purchases in Philadelphia were admittedly not interfered with (R. 421, 430, 435). The S. P. C. A. and motorcycle-policeman incidents in New Jersey, were in no way connected up with any of the defendants (R. 445). The alleged refusal of a Newark commission merchant to sell him, in September, 1931, was unequivocally denied (R. 716, 742-744, 747, 748). Of this witness, the Court below said: "* * * in many respects he so exaggerated, in many respects he

was so vague about dates, that I could attach no considerable probative effect to his testimony" (R. 68). "I have the dates so confused from the testimony of this witness that it is difficult to tell just what he did testify" (R. 436).

Max Cohen's inability to obtain poultry at West Washington Market, in October, 1931, was due exclusively to the fact that his credit was bad (R. 481, 482, 485, 739). The unions were in no way concerned in his difficulties. On the contrary, upon his plea, and in spite of an agreement between him and the unions to employ a specified number of union men, a number of laborers were voluntarily withdrawn by the unions (R. 482-486).

Jacob Miller, a Bronx retailer, testified to alleged threats of physical violence against him by Charles Herbert, delegate of the Shochtim Union, during Passover in 1931 (R. 617, 618). His testimony was denied by each of the persons allegedly involved in the incidents concerning which he testified (R. 664, 671, 672, 674). In his comments on the witness, Judge Caffey referred to him as "an explosive, extremely biased person" (R. 67).

Kalman Gordon's inability to get poultry after a dispute with the unions over the number of union men he should employ, was due solely to the fact that union men refused to load for him (R. 631). No threats were made by the unions; wholesalers did not refuse to sell (R. 631, 633). Prices or allocation of customers were in no way involved.

The difficulty experienced by *Alexander Perlman,* in December, 1929, in getting poultry at West Washington Market, cannot be attributed to the use by defendants of unlawful methods. The cause was a *bona fide* labor dispute (R. 646-650). Until it was settled by the parties, the union men rightfully refused to load for him (R. 69). Commis-

sion men never refused to sell to him (R. 651). He was never threatened with violence. Neither price fixing nor allocation of customers was in any way involved.

In the period subsequent to August, 1928, the unions were associated with alleged allocation of customers by the testimony of one witness, *Abraham Aaron*. He testified that during Thanksgiving of 1931, he attempted to buy poultry from the Majestic Live Poultry Market; that the proprietor (whose name he did not know), refused to sell to him, stating that if he sold to other than his regular butchers, the union would compel him to take on an additional man (R. 535, 536). Assuming the admissibility of these statements as proof of their truth (which we do not concede, in view of the absence of proof connecting the alleged speaker in any way with the alleged conspiracy), the same is entitled to little weight. Not only was the testimony of the witness totally uncorroborated, but the statements attributed to Sewald, owner of the Majestic Market, were categorically denied by him (R. 701-703). In addition, the testimony of the witness Aaron that he was absolutely refused poultry, is directly contradicted by the documentary evidence. Defendants' Exhibits N and O are sales tickets, of sales made by the Majestic Market to Aaron on November 26 and November 30, 1931 (R. 702, 906A, 906B). That his address rather than his name appears on one ticket, is due to the custom of marketmen to refer to butchers by their business addresses.

The testimony thus presented, includes every instance of alleged interferences in which the unions were in any way involved, subsequent to the Summer of 1928.

D.

Attempts at Organization.

The associations existing or organized after August, 1928, were referred to, on behalf of petitioner, as sinister

indications that the alleged conspiracy was completely alive, though under cover, dangerously threatening to burst forth in full bloom. It is our intention to show, on the contrary, that each attempt at organization was chiefly born of a need to eradicate the deepseated evil of the industry: credits.* Notwithstanding petitioner's efforts to infer the contrary, there is no evidence associating these organizations in any way with either of the unions.

In connection with the facts here presented concerning attempts at organization, it might be well to keep in mind the statement of this Court in *Cement Manufacturers Protective Assn.* v. *U. S.*, 268 U. S. 588, at page 604:

> "* * * we cannot regard the procuring and disseminating of information which tends to prevent the procuring of fraudulent contracts or to prevent the fraudulent securing of deliveries of merchandise on the pretense that the seller is bound to deliver it by his contract, as an unlawful restraint of trade.
>
> "In *Swift* v. *U. S.*, 196 U. S. 375, 395, this Court approved a decree which provided that defendants should not be restrained from 'establishing and maintaining rules for the giving of credit to dealers where such rules in good faith are calculated solely to protect the defendants against dishonest or irresponsible dealers.'"

1.

The *Greater New York Live Poultry Chamber of Commerce* apparently continued in existence until about January 1930. After the Summer of 1928, it seems to have been nothing but a skeleton. In testimony relating to this period, there are no references to it. Its sole function seems to have been the collection and disbursement of the moneys

* Credit losses suffered by marketmen were substantial. The following witnesses testified to losses for eleven months in 1931 as follows: Gerber, $4,000-$5,000 (R. 680); Scull, $7,000 (R. 692); Rosenblum, $3,000 (R. 697); Brookstein, $1,200-$1,600 (R. 699); Sewald, $1,200 (R. 703); Platzik, $1,500 (R. 706); Hoffman, $3,000 (R. 710); Steinberg, $12,000 (R. 718).

previously assigned to it by its members (R. 733, 734). The greater part of its disbursements appear to have been for legal counsel, apparently in connection with the criminal prosecution (R. 733, 734). To contend that the mere existence of the Chamber of Commerce evidenced the continuance of the alleged conspiracy is to ignore the facts.

2.

The *L. W. Credit Association* was an organization of East Side marketmen, formed after the indictment, and dissolved some time prior to the criminal trial in 1929. Testimony concerning the Association was given by two Government witnesses. The witness *Rosenfeld* testified that he was employed by the Association to check the amount of poultry sold in a particular market and to report the same to a central office (R. 458); that the plan of the Association was to require each member to pay 4c for each pound of poultry sold by him in excess of a specified amount, the money collected to be paid to members who sold below a specified poundage (R. 457, 458). The witness *Weidberg*, on the other hand, testified that the Association was purely a credit organization; that the sole purpose of the "watchers" was to report marketmen who failed to abide by the Association's rules regarding sales to retailers owing bills (R. 211, 212).

Giving full credence to the testimony thus adduced concerning the L. W. Credit Association, we fail to see its significance. Allocation of customers and price fixing, the essential elements of the alleged conspiracy, found no place in the plans of the organization.

In an attempt to associate the Association with allocation of retailers, petitioner introduced the witness *Kugler*. He testified of "hearing" of the L. W. Credit Association, from other "butchers" (R. 600, 602); that some time after its formation, he was refused poultry by one marketman

and told to return to his regular dealer (R. 601); that a third dealer, one Hoffman, stated that the defendant Weidberg, the alleged head of the Association, ordered him not to sell to the witness (R. 602). *Hoffman*, when called, categorically denied the statements attributed to him by Kugler, and further denied any attempts by Weidberg, or any one else, to dictate to whom he should sell (R. 709, 710). In any event, the evidence in no way indicates a connection between the refusal to sell Kugler and the L. W. Credit Association.

Certainly, the existence of the Association cannot be relied upon to support the contention that the alleged conspiracy, latent or patent, existed during 1929.

3.

Practically no reference is made in the record to the *Retail Poultry Dealers' Association*. It appears to have been composed mainly of retailers, with a small membership of marketmen (R. 170, 172, 178). The facts surrounding its organization, purposes and functions do not appear in the record.

4.

The record is similarly barren of testimony regarding the organization and purposes of the *Live Poultry Dealers Protective Association of New York and Vicinity*. The one fact which does appear is that its members executed assignments of 10c. per coop on coops rented to them by Bernstein & Sons, Inc., and that certain payments were made weekly from December, 1928 to September, 1931, apparently in accordance with the asignments (R. 797-801). How the money was expended, does not appear. The Association seems to have been absorbed by the Live Poultry Slaughterhouse Association (R. 477).

5.

The *Live Poultry Slaughterhouse Association* was organized in September, 1931, under the auspices of Charles H. Tuttle, former United States Attorney for the Southern District of New York, and George Mintzer, former Chief Assistant United States Attorney (R. 168). That the organization was created solely for the purpose of remedying the evils of the industry is clear (R. 477-479, 690-692). The Government's concession that the purposes of the Association were laudatory (R. 697) was unnecessary, in view of the testimony concerning the organization. The attempt of petitioner to associate the individual members with schemes to eliminate competitive bidding, allocate customers and fix prices, finds absolutely no support in the record (R. 166, 169, 667, 690, 691, 692, 694, 697). The effort to associate the unions with the organization, likewise proved abortive (R. 166-169, 667, 690, 691, 694, 697).

6.

The *Harlem & Bronx Poultry Board of Trade* was organized for the sole purpose of dispensing credit information (R. 664, 672, 674, 723-726, 907, 908, 935). Membership was entirely voluntary (R. 726). Petitioner attempted to show the contrary by evidence that Max Cohen, after withdrawing from the organization, was unable to get poultry. The proof is clear, however, that his difficulties were purely financial, totally unconnected with his withdrawal from the Board of Trade (R. 481, 482, 485, 726, 739).

To associate the Board of Trade with allocation of customers or price fixing, is to ignore the proof; a similar lack of connection between the Board of Trade and the unions exists, petitioner's efforts to infer the contrary notwithstanding.

E.

The Superior Live Poultry Market Incident.

The Superior Live Poultry Market incident, in Newark, New Jersey, was purely a local affair. Neither New York poultry dealers nor the unions were in any way involved (R. 717, 731, 732, 744-747). The attempt to link the troubles of the Superior Market with the alleged conspiracy, was woefully weak. To achieve the connection, petitioner relied upon the alleged statement of an unknown person to the witness *Goldman*, that if the latter sold poultry to Nochemson, "you couldn't get stuff" (R. 519). The unknown was identified only by the name "Max". Who he was, does not appear. Whether "Max" was the defendant Max Keslin, the witness could not say; he never heard the name "Max Keslin" (R. 520).

F.

September, 1931, Price Rise.

The testimony of a number of butchers was introduced by petitioner to demonstrate the dangerous probability of resumption of the alleged conspiracy. They testified to a rise in the price of poultry on September 19, 1931 (R. 288, 555, 598, 607, 610, 615, 616, 624, 626), and in some instances, to alleged statements by marketmen and others to the effect that a new combination of marketmen was being formed to regulate prices (R. 288, 289, 598, 607, 610, 616, 624).

The defendants produced every individual who was alleged to have made the statements concerning a combination to standardize prices.* In each instance, they cate-

* In not a single instance was the alleged speaker connected, inferentially or otherwise, with the alleged conspiracy or conspirators.

gorically denied the conversations attributed to them by the butchers (R. 664, 672, 675, 676, 682, 683, 687, 696, 697, 699, 700, 701, 702, 705, 706, 712, 728). Of great significance is the fact that the butchers of Brooklyn were, at the same time, engaged in a controversy over prices with the marketmen; they objected to their being charged higher prices than chicken dealers (R. 469, 470, 534, 555-557, 559, 677, 686, 687, 688-690).

The proof adequately demonstrates that the price rise on September 19th (a) was not nearly as great as the butchers testified (R. 664, 666, 672, 675, 676, 678, 680, 682-684, 691, 696, 700, 703, 707, 712, 728, 729, 730, 734-737, 738, 740-742, 752, 753, 936, 937, 938),* and (b) was due not to a preconceived plan, but to the dearth of poultry and extra expenses created by the Jewish holidays, which came in on the day of the rise and continued to the end of October (R. 469, 562, 613, 614, 627, 664, 666, 675, 678, 679, 685, 690, 703, 712, 753).

G.

Failure of Appellants to Testify.

The Court below made much of the fact that the appellants, though in Court, failed to take the stand (R. 51, 55). In the existing state of the evidence, there was no necessity for their doing so. "It would be generally agreed, to be sure, that the mere fact of the party's failure to testify is not of itself open to inference; it is his failure when he could be a useful and material witness that is significant"

* The butchers, for example, testified that they were charged 10c. to 12c. a pound above the cost to the marketmen; the books of marketman Gerber, who was one of the alleged profiteers, show that the highest price charged by him was 5c. a pound above his cost (R. 909-934). It also appears that the butchers, in almost every instance in which they believed they were being overcharged, deducted anywhere from one to four cents a pound from their bills, the protests of the marketmen notwithstanding (R. 599, 619, 620, 625, 626, 676, 680, 683, 709, 703, 712, 726).

(Wigmore, Evidence (2d ed.), §289). Their denials regarding the alleged conspiracy, for which they were convicted, were stricken out as sham (R. 25-32). In consequence, they were debarred from testifying with respect thereto. As to the period subsequent to August, 1928, petitioner presented no evidence which required testimony from the defendants, with the exception, possibly, of the Steinberg incident. This matter, being fully covered at the hearing before Judge Knox, and being a part of the record herein (Ex. A), there was no reason even here for them to testify.

In the light of these facts, it is submitted that no unfavorable inferences were properly deducible from appellants' failure to assume the stand.

THIRD POINT.

In any event, the petitioner did not sustain its burden as against the defendants Weiner, Rosenman and Markman. There was no credible evidence connecting them with the alleged conspiracy. The decree should be reversed as against these defendants.

A.

Joseph Weiner was one of the defendants named in the indictment. A verdict was directed in his favor at the close of the Government's case therein (Ex. 7, p. 2).

An analysis of the testimony of each of the witnesses by whom he was mentioned herein, demonstrates that the petitioner has failed to sustain its burden as to him. Not a scintilla of evidence appears to connect him with the alleged conspiracy.

Albert Winkel testified that Weiner was on the payroll of the Chamber of Commerce for two or three weeks in the Summer of 1927, and that he received two week's salary of $75 per week (R. 152). According to the witness, he was hired and paid to represent the marketmen in a controversy with the labor unions, which was then pending; he worked to "smooth out our differences" (R. 165).

Aaron Steinberg, chief complainant against the unions, had nothing but praise for Weiner. He testified that Weiner earnestly endeavored to adjust his difficulties with the unions (R. 196, 199, 200).

Louis Weidberg denied any knowledge of payments of money to Weiner by Benjamin Simon, supervisor of the Chamber of Commerce (R. 208).

David Hirshon testified that Weiner was not present at the sectional meeting of Brownsville marketmen in July,

1927 (R. 251, 252); that Weiner became a delegate of the Shochtim Union in 1927 (R. 256); that Weiner did not receive $50 a week from the Chamber of Commerce (R. 262).

Mack Harnett, concerning Weiner, stated that he was approached by the latter on several occasions, and asked to take on additional union labor (R. 310, 311, 315); that he was told that if he did take additional men, he would be loaded in New York (R. 322).

Barney Hecht (R. 68), to whom the Court referred as "scatterbrained" (R. 68), spoke of a "Weiner" several times in his testimony (R. 400, 401, 409, 416, 417, 421). But whether he was referring to the defendant Joseph Weiner, is impossible of ascertainment in view of his contradictory statements and his inability to identify the latter (R. 409, 416, 417).

The name of Weiner appears also, in the testimony of the witness *Benjamin Rothschild*, who stated of him merely that he was a delegate of the Shochtim Union (R. 499, 500).

The above references include every allusion to Joseph Weiner in the record.

B.

The appellant *Joseph Rosenman* was not a defendant in the criminal prosecution.

In the instant record, he is referred to by *Aaron Steinberg*, who merely stated of him that he was secretary of the Shochtim Union (R. 184).

Louis Weidberg, in his testimony, stated that he made payments to Rosenman, as an officer of the Shochtim Union, to enable East Side marketmen to get additional shochtim on busy days, without further payment (R. 210, 211).

David Hirshon testified that Rosenman did not attend the sectional meeting of marketmen in July, 1927 (R. 251).

Barney Hecht stated that Rosenman handed him the contract which he signed with the Shochtim Union, saying

that Hecht needn't go to Newark or Philadelphia for his poultry thenceforward (R. 438).

Benjamin Rosenfeld testified that Rosenman refused to let him have a shochet unless he promised not to do any wholesale business (R. 450, 454).

Benjamin Rothschild stated upon his examination that he was handed a card by Rosenman, upon being sent to a job, and told not to slaughter for "butchers" (R. 500); that after the criminal trial he was asked by Rosenman why he testified as he did, and told he would be punched in the face (R. 505).

No further references to Rosenman appear in the testimony. Judge Caffey stated regarding him, that his was the case which had "given me most trouble" (R. 63).

C.

Morris Markman was a defendant in the criminal prosecution, but was not convicted therein. In the trial herein, he was not referred to. A single witness, *Barney Hecht,* stated that one "Nigger" told him at the New York Central Railroad Terminal that he was on the "blacklist" and couldn't get poultry (R. 402). No proof that "Nigger" was the defendant Markman appears, however.

D.

Neither Weiner, Rosenman or Markman took the stand. It is submitted, however, that the proof did not require testimony of them. There was nothing for them to deny or to affirm. Not a scintilla of evidence was adduced to connect them with the alleged conspiracy or any act of wrongdoing. In this state of the evidence, unfavorable inferences should not be drawn against them (*See* Wigmore, Evidence (2d ed.) §289).

FOURTH POINT.

The Court below committed reversible error in striking out as sham portions of the answers of the defendants convicted in the criminal prosecution.

A.

Upon order of Honorable John M. Woolsey, District Judge, denials of particular allegations of the amended petition, relating to the alleged original conspiracy were stricken out (R. 25-32). The law of the case was thereby made.

> *Commercial Union of America* v. *Anglo-South American Bank*, 10 F. (2d) 937;
> *Farmers Loan & Trust Co.* v. *Miller*, 298 F. 758;
> *Hadden* v. *Natchang Silk Co.*, 84 F. 80 (aff'd. 179 U. S. 646).

And the convicted defendants were thereby debarred from contradicting by evidence petitioner's proof relating to the said conspiracy.

> *C. I. T. Corporation* v. *Sanderson*, 49 F. (2d) 937, 938.

B.

Judge Woolsey's decision was based upon the alleged fact that the denials in the answers of the convicted defendants, insofar as the first twenty-three paragraphs of the amended petition were concerned, were sham (R. 25-32). This conclusion rested upon a review of the evidence adduced in the criminal prosecution (R. 25-29). It was not based upon the fact of prior adjudication, and the principles

of law relating thereto (R. 25-29). (*Cf.* 53 F. (2d) 518; 44 F. (2d) 393.)

C.

There is no precedent in non-code jurisdictions for the striking out of portions of an answer in equity as sham. Authority for the action of Judge Woolsey is not contained in the Equity Rules. Rule 21 obviously does not authorize a motion to strike out a pleading as sham.*

Cases there are in which the whole of an answer in equity was stricken out. The basis for this action is "an inherent power" of the court "to prevent the abuse of legal machinery" (*Remington* v. *Scoles* (1897), 2 Ch. 1).

See, too:

Reichel v. *Magrath*, 14 App. Cas. 665.

D.

Assuming the power of the District Court to strike out *portions* of an answer, to prevent an abuse of its process, the exercise of the power was not justified herein.

The striking out of a pleading upon this ground is "very unusual"; it is restricted to "exceptional cases" (Lindley, *L. J.*, and Romer, *J.*, respectively in *Remington* v. *Scoles, supra*). "It is a jurisdiction which ought to be very sparingly exercised, and only in very exceptional cases" (*Lawrence* v. *Lord Norreys*, 15 App. Cas. 210, 219).

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* Rule 21 of the Equity Rules reads as follows: "The right to except to bills, answers, and other proceedings for scandal or impertinence shall not obtain, but the court may, upon motion or its own initiative, order any redundant, impertinent, or scandalous matter stricken out upon such terms as the court shall think fit."

The cases in which the power was exercised are so clear, as to leave not the slightest room for doubt. Evidence respecting the allegations of the condemned pleading was inadmissible in each of these cases as a matter of law (*Lawrence* v. *Norreys*, *supra*; *Reichel* v. *Magrath*, *supra*), or the pleader by sworn testimony, directly contradicted the allegations of his pleading (*Remington* v. *Scoles*, *supra*).

In the instant case, on the contrary, the principle of *res judicata* (except insofar as applied by Judge Bondy, 44 F. (2d) 393), was not applicable so as to render evidence under the stricken denials inadmissible as a matter of law. Nor had the defendants by sworn testimony, in any way contradicted their pleading; rather, they had vigorously denied complicity in the conspiracy: the record of the criminal case is a mass of conflicting testimony (Ex. 7).

In this state of the matter, and in the light of the authorities, it is submitted that insofar as the defendants were not estopped by the prior adjudication, the Court was not justified in striking out portions of their answers. There was no abuse of the Court's process.

FIFTH POINT.

In any event, the decree should be modified by eliminating Paragraph "8 (l)" therefrom, and by limiting the sweep of the injunction to conduct tending to the restraint of interstate commerce.

A.

1. In *Hitchman Coal & Coke Co.* v. *Mitchell*, 245 U. S. 229, the Court modified the decree "by eliminating picketing and physical violence from the sweep of the injunction", upon the ground that it could "find no evidence that either of these forms of interference was threatened" (at p. 262).

2. Paragraph 8 (l) of the decree perpetually enjoins the defendants "from using any of the offices or positions in Local 167 of the International Brotherhood of Teamsters, Chauffeurs, Stablemen and Helpers of America, or in the Official Orthodox Poultry Slaughterers of America, Inc. or in similar organizations, for the purpose of coercing marketmen to buy poultry, poultry feed, or other commodities necessary to the poultry business, from any particular sellers thereof" (R. 81).

Not a scintilla of evidence appears in the record to justify this portion of the decree. The sale of feed is nowhere mentioned in the record; the use of coercion in its distribution does not appear even by inference.

With the renting of coops by the New Jersey Coop Company or Bernstein & Sons, the defendants were in no way concerned (R. 886). Not an iota of evidence appears to justify an inference that the defendants coerced, or threatened coercion of marketmen, in the purchase of coops or other commodities from particular sellers.

B.

In view of the finding of the Court below that interstate commerce ceased with the sale from the receiver to the marketman, the injunction should have been limited to acts and conduct of the defendants only in so far as the same restrained commerce to this point. The transactions of the marketman after the sale are admittedly intrastate commerce. Consequently, in so far as the defendants are concerned with these matters and with the marketman after the sale by the receiver, they are engaged solely in intrastate trade. As thus engaged, their acts had no direct or substantial effect upon interstate commerce.* It was, therefore, error to enjoin them beyond the point indicated.

Industrial Assn. v. *U. S.*, 268 U. S. 64;
Anderson v. *U. S.*, 171 U. S. 604;
United Mine Workers v. *Coronado Coal Co.*, 259 U. S. 344;
United Leather Workers v. *Herbert & M. Trunk Co.*, 265 U. S. 457.

It follows that the decree should be modified, and the injunction limited to acts of the defendants directly connected with interstate commerce.

CONCLUSION.

The decree should be reversed, or, in the alternative, modified to the extent set forth above.

Respectfully submitted,

SAMUEL H. KAUFMAN,
NATHAN D. PERLMAN,
Appellants' Solicitors.

* During the period of the alleged conspiracy, there was no decrease in interstate trade and commerce in live poultry (R. 373). On the contrary, in the three years preceding the trial herein, there was an increase of five per cent. in the traffic (R. 754).